

**REGULATORY IMPACT REVIEW AND
INITIAL REGULATORY FLEXIBILITY ANALYSIS
INTERIM TRIBAL ALLOCATION OF PACIFIC WHITING FOR 2013
FEBRUARY 7, 2013**

National Marine Fisheries Service (NMFS). Rulemaking must comply with Executive Order (EO) 12866 and the Regulatory Flexibility Act (RFA). The EO requires a Regulatory Impact Review (RIR).

The NMFS Economic Guidelines that describe the RFA and EO 12866 can be found at:
http://www.nmfs.noaa.gov/sfa/domes_fish/EconomicGuidelines.pdf.

The RFA can be found at 5 U.S.C. 601 et seq.:
<http://www.archives.gov/federal-register/laws/regulatory-flexibility/>

Executive Order 12866 can be found at:
<http://www.plainlanguage.gov/populartopics/regulations/eo12866.pdf>

REGULATORY IMPACT REVIEW CONSIDERATIONS AND REQUIREMENTS

NMFS undertakes an RIR for all regulatory actions of public interest. The RIR provides a review of the changes in benefits to society associated with proposed regulatory actions. Typically an RIR describes the fishery, provides a statement of the problem and the associated management objectives, and describes the major alternatives under consideration. The RIR also provides an economic analysis of the expected effects of each selected alternative.

The RIR provides information on whether an action would be a significant regulatory action. Under EO 12866, an action may be considered significant if it is expected to: 1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; 2) Create a serious inconsistency or otherwise interfere with action taken or planned by another agency; 3) Materially alter the budgetary impact of entitlement, grants, user fees, or loan programs or the

rights and obligations of recipients thereof; or 4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the EO.

INITIAL REGULATORY FLEXIBILITY ANALYSIS CONSIDERATIONS AND REQUIREMENTS

The RFA, 5 U.S.C. 603 et seq., requires government agencies to assess the effects that regulatory alternatives would have on small entities, including small businesses, and to determine ways to minimize those effects. When an agency proposes regulations, the RFA requires the agency to prepare and make available for public comment an Initial Regulatory Flexibility Analysis (IRFA) that describes the impact on small businesses, non-profit enterprises, local governments, and other small entities. The IRFA is to aid the agency in considering all reasonable regulatory alternatives that would minimize the economic impact on affected small entities. Under the RFA, an agency does not need to conduct an IRFA and/or Final Regulatory Flexibility Analysis (FRFA) if an agency can certify that the proposed rule will not have a significant economic impact on a substantial number of small entities. To certify, the agency needs to state the basis and purpose of the rule, describe and estimate the number of small entities to which the rule applies, estimate economic impacts on small entities, by entity size and industry, and explain the criteria used to evaluate whether the rule would impose “significant economic impacts.”

Under the RFA, the term “small entities” includes small businesses, small organizations, and small governmental jurisdictions.

Small businesses. The Small Business Administration (SBA) has established size criteria for all major industry sectors in the US, including fish harvesting and fish processing businesses. A business involved in fish harvesting is a small business if it is independently owned and operated and not dominant in its field of operation (including its affiliates) and if it has combined annual receipts, not in excess of \$4.0 million for all its affiliated operations worldwide. A seafood processor is a small business if it is independently owned and operated, not dominant in its field of operation, and employs 500 or fewer persons on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide. A business involved in both the harvesting and processing of seafood products is a small business if it meets the \$4.0 million criterion for fish harvesting operations. A wholesale business servicing the fishing industry is a small business if it employs 100 or fewer persons on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide. For marinas and charter/party boats, a small business is one with annual receipts, not in excess of \$7.0 million.

Small organizations. The RFA defines small organizations as any nonprofit enterprise that is independently owned and operated and is not dominant in its field.

Small governmental jurisdictions. The RFA defines small governmental jurisdictions as governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of less than 50,000.

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RIR/RFA Analyses

The Analyses below addresses both the RIR and RFA requirements.

Description of the Management Objectives & Legal Authority

This proposed rule would establish a Pacific whiting tribal allocation for 2013 for Pacific Coast Indian tribes that have a Treaty right to harvest groundfish. NMFS issues this proposed rule for the 2013 Pacific whiting fishery under the authority of the Pacific Coast Groundfish Fishery Management Plan (FMP), the Magnuson Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), and the Pacific Whiting Act of 2006. The regulations at 50 CFR 660.50(d) establish the process by which the tribes with treaty fishing rights in the area covered by the Pacific Coast Groundfish Fishery Management Plan (FMP) request new allocations or regulations specific to the tribes, in writing, during the biennial harvest specifications and management measures process. The regulations state “the Secretary will develop tribal allocations and regulations under this paragraph in consultation with the affected tribe(s) and, insofar as possible, with tribal consensus.” These procedures have been employed by NOAA since May 31, 1996. These procedures are designed to provide a framework process by which NOAA Fisheries can accommodate tribal treaty rights by setting aside appropriate amounts of fish in conjunction with the Pacific Fishery Management Council (Council) process for determining harvest specifications and management measures. Since 1996, NMFS has been allocating a portion of the U.S. Total Allowable Catch (TAC) (previously called Optimum Yield (OY) or Annual Catch Limit (ACL) prior to 2012) of Pacific whiting to the tribal fishery following the process established in 50 CFR 660.50(d).

Description of each alternative considered in the analysis

The proposed allocation, based on discussions with the tribes is for NMFS to allocate 17.5% plus 16,000 mt of the U.S. total allowable catch for 2013. This allocation is based on exchanges with

the tribes during December, 2012 and more recently in January, 2013. The Makah and Quileute tribes have indicated their intent to participate in the tribal whiting fishery in 2013. The Quinault Indian Nation indicated that they were not planning to participate in 2013, but reserved the right to participate if circumstances changed. The Hoh tribe has not expressed an interest in participating to date. The Makah tribe has requested 17.5% of the U.S. TAC, and the Quileute Indian Nation has requested 16,000 mt, creating a formula $[17.5 \text{ percent} * (\text{U.S. TAC})] + 16,000 \text{ mt}$ for application to the range of TACs.

NMFS did not consider a broad range of alternatives to the proposed tribal allocation. The tribal allocation is based primarily on the requests of the tribes. These requests reflect the level of participation in the fishery that will allow them to exercise their treaty right to fish for whiting. Consideration of amounts lower than the tribal requests is not appropriate. Based on the information available to NMFS, the tribal request is within their tribal treaty rights. A higher allocation would be, arguably, within the scope of the treaty right. However, a higher allocation would unnecessarily limit the non-tribal fishery. A no action alternative was considered, but the regulatory framework provides for a tribal allocation on an annual basis only. Therefore, no action would result in no allocation of Pacific whiting to the tribal sector in 2013, which would be inconsistent with NMFS' responsibility to manage the fishery consistent with the tribes' treaty rights. Given that there is a tribal request for allocation in 2013, this alternative received no further consideration.

Description of the Fishery

The Pacific whiting fishery harvests almost exclusively Pacific whiting. While bycatch of other species occurs, the fishery is constrained by bycatch limits on key overfished species. This is a high-volume fishery with low ex-vessel prices per pound. This fishery has seasonal aspects based on the distribution of whiting off the west coast. The table below provides a history of U.S. OYs/ACLs and the annual tribal allocation in metric tons (mt). Over the years, 2000 to-2012, the tribal allocation has ranged from a low of 22,680 mt in 2002 to a high of 66,908 mt in 2011. On a percentage basis, the tribal allocation has ranged from a low of 12.1% in 2006 to a high of 36.8% in 2009.

<u>Year</u>	<u>U.S. OY</u>	<u>Tribal Allocation</u>
2000	232,000 mt	32,500 mt
2001	190,400 mt	27,500 mt

2002	129,600 mt	22,680 mt
2003	148,200 mt	25,000 mt
2004	250,000 mt	32,500 mt
2005	269,069 mt	35,000 mt
2006	269,069 mt	32,500 mt
2007	242,591 mt	35,000 mt
2008	269,545 mt	35,000 mt
2009	135,939 mt	50,000 mt
2010	193,935 mt	49,939 mt
2011	290,903 mt	66,908 mt
2012	186,037 mt TAC ¹	48,556 mt

Beginning in 2012, the term Total Allowable Catch is now used, based on the Agreement between the Government of the United States of America and the Government of Canada on Pacific Hake/Whiting.

For the years 2007 to 2011, the total whiting fishery (tribal and non-tribal) has averaged harvests of 199,000 mt annually worth \$37 million in terms of ex-vessel revenues. As the U.S. OY/ACL has been highly variable during this time, so have harvests. During this period, harvests have ranged from 122,000 mt (2009) to 248,000 mt (2008). In 2011, harvests are estimated to be about 231,000 mt. Ex-vessel revenues have also varied. Annual ex-vessel revenues have ranged from \$16 million (2009) to \$58 million (2008). Ex-vessel revenues in 2011 were about \$53 million. As harvests have varied, so have prices. These prices are largely determined by the world market for groundfish as most of the whiting harvested is exported. Ex-vessel prices have ranged from \$128 per mt (2009) to \$224 per mt (2008). Average ex-vessel price for trawl harvested whiting in 2011 was \$230 per mt. For 2012, average ex-vessel prices increased to \$309 per mt leading to \$49 million in ex-vessel revenues based on total harvests of about

160,000 mt. Note that the use of ex-vessel values does not take into account the wholesale or export value of the fishery or the costs of harvesting and processing whiting into a finished product. NMFS does not have sufficient information to make a complete assessment of these values.

Description of affected entities including the number of small entities to which the rule applies.

This rule affects how whiting is allocated to the following sectors/programs: Tribal, Shorebased Individual Fishing Quota (IFQ) Program—Trawl Fishery, Mothership Coop (MS) Program—Whiting At-sea Trawl Fishery, and Catcher-Processor (C/P) Coop Program—Whiting At-sea Trawl Fishery. The amount of whiting allocated to these sectors is based on the U.S. TAC. From the U.S. TAC, small amounts of whiting that account for research catch and for bycatch in other fisheries are deducted. The amount of the tribal allocation is also deducted directly deducted from the TAC. After these deductions are accounted for, the remainder is the commercial harvest guideline. This guideline is then allocated among the other three sectors as follows: 34 percent for the C/P Coop Program; 24 percent for the MS Coop Program; and 42 percent for the Shore based IFQ Program.

The shorebased IFQ fishery is managed with individual fishing quotas for most groundfish species, including whiting. Annually, quota pounds (QP) are allocated from the shorebased sector allocation based on the individual quota shares (QS) of each QS owner. (QP is expressed as a weight and QS is expressed as a percent of the shorebased allocation for a given species or species group.). Quota pounds (QP) may be transferred from a QS account to a vessel account or from one vessel account to another vessel account. Vessel accounts are used to track how QP is harvested as QP is to cover catch (landings and discards) by limited entry trawl vessels of all IFQ species/species groups. Shorebased IFQ catch must be landed at authorized first receiver sites. The IFQ whiting quota shares (QS) were allocated to a mixture of limited entry permit holders and shorebased processors. One non-profit organization received quota share based on the ownership of multiple limited entry permits. The MS coop sector can consist of one or more coops and a non-coop subsector. For a MS coop to participate in the Pacific whiting fishery, it must be composed of MS catcher-vessel (MSCV) endorsed limited entry permit owners. Each permitted MS coop is authorized to harvest a quantity of Pacific whiting based on the sum of the catch history assignments for each member's MS/CV-endorsed permit identified in the NMFS-accepted coop agreement for a given calendar year. Each MS/CV endorsed permit has an allocation of Pacific whiting catch based on its catch history in the fishery. The catch history assignment (CHA) is expressed as a percentage of Pacific whiting of the total MS sector allocation. Currently the MS sector is composed of only a single coop. (Shorebased IFQ QS and MS sector CHA are not scheduled to begin trading until 2014, pending resolution of the *Pacific Dawn v Bryson* litigation where the rules used to allocate whiting QS and CHA are being challenged.) The C/P coop program is a limited access program that applies to vessels in the C/P sector of the Pacific whiting at-sea trawl fishery and is a single voluntary coop. Unlike the MS coop regulations where multiple coops can be formed around the catch history assignments of each coop's member's endorsed permit, the single C/P coop receives the total Pacific whiting allocation for the catcher/processor sector. Only C/P endorsed limited entry permits can participate in this coop. Currently (February 2013), the Shorebased IFQ Program is composed of 138 QS permits/accounts, 142 vessel accounts, and 50 first receivers. The mothership coop

fishery is currently composed of a single coop, with six mothership processor permits, and 36 MS/CV endorsed permits with one permit having two catch history assignments endorsed to it. The C/P coop is composed of 10 catcher-processor permits owned by three companies. There are four tribes that can participate in the tribal whiting fishery. The current tribal fleet is composed of 5 trawlers that either deliver to a shoreside plant or to a contracted mothership.

Participants in the whiting fishery include fish harvesting companies, fish processing companies, companies involved in both harvesting and processing of seafood products such as catcher-processors, organizations, and governmental jurisdictions. The Small Business Administration has established size criteria for all major industry sectors in the US, including fish harvesting and fish processing businesses. A business involved in fish harvesting is a small business if it is independently owned and operated and not dominant in its field of operation (including its affiliates) and if it has combined annual receipts, not in excess of \$4.0 million for all its affiliated operations worldwide. A seafood processor is a small business if it is independently owned and operated, not dominant in its field of operation, and employs 500 or fewer persons on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide. A business involved in both the harvesting and processing of seafood products is a small business if it meets the \$4.0 million criterion for fish harvesting operations. A wholesale business servicing the fishing industry is a small business if it employs 100 or fewer persons on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide. For marinas and charter/party boats, a small business is one with annual receipts, not in excess of \$7.0 million. The RFA defines small organizations as any nonprofit enterprise that is independently owned and operated and is not dominant in its field. The RFA defines small governmental jurisdictions as governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of less than 50,000.

These regulations directly affect IFQ Quota share holders who determine which vessel accounts receive QP, holders of mothership catcher-vessel-endorsed permits who determine how many co-ops will participate in the fishery and much fish each co-op is to receive, and the catcher-processor co-op which is made up of three companies that own the catcher-processor permits. As part of the permit application processes for the non-tribal fisheries, based on a review of the SBA size criteria, applicants are asked if they considered themselves a “small” business and to provide detailed ownership information. Although there are three non-tribal sectors, many companies participate in two or more of these sectors. All mother ship catcher-vessel participants participate in the shorebased IFQ sector while two of the three catcher-processor companies also participate in both the shorebased IFQ sector and in the MS sector. Many companies own several QS accounts. After accounting for cross participation, multiple QS account holders, and for affiliation through ownership, there are 100 non-tribal entities directly affected by these proposed regulations, 82 of which are considered to be “small” businesses. These regulations also directly affect tribal whiting fisheries. Based on groundfish ex-vessel revenues and on tribal enrollments, the population size (enrollment) of each tribe, the four tribes and their fleets are considered “small” entities.

An economic analysis of the expected effects of each selected alternative relative to the No Action Alternative including estimates of economic impacts on small entities, by entity size and industry

This rule allocates fish between tribal harvesters (harvest vessels are small entities, tribes are small jurisdictions) to non-tribal harvesters (a mixture of small and large businesses). Tribal fisheries are a mixture of activities that are similar to the activities that non-tribal fisheries undertake. Tribal harvests are delivered to both shoreside plants and motherships for processing. These processing facilities also process fish harvested by non-tribal fisheries. The effect of the tribal allocation on non-tribal fisheries will depend on the level of tribal harvests relative to their allocation and the reapportioning process. If the tribes do not harvest their entire allocation, then there are opportunities during the year to reallocate unharvested tribal amounts to the non-tribal fleets. For example, last year, NMFS did such a reallocation. On, October 4, 2012, NMFS announced: “The best available information on October 2, 2012 indicates that at least 28,000 mt of the tribal allocation of 48,556 mt for the 2012 tribal Pacific whiting fishery will not be used by December 31, 2012. Recent conversations with tribal fishery managers indicate that reapportioning 28,000 mt, leaving a tribal allocation of 20,556 mt, will not limit tribal harvest opportunities for the remainder of year. Tribal harvests to date amount to less than 1,000 mt. In addition, the Quileute Tribe has not entered the fishery to date. Even if the Quileute Tribe enters the fishery, the remaining tribal allocation following reapportionment will allow for their participation. (October 4, 2012 NMFS Official Notice—Reapportionment of Pacific Whiting & Minor Slope Rockfish Bycatch Notice.” The effect of this reapportioning process is to allow unharvested tribal allocations of whiting to be fished by the non-tribal fleets, benefitting both large and small entities.

Reporting and recordkeeping requirements.

There are no reporting or recordkeeping requirements with this rule.

Relevant Federal rules that may duplicate, overlap or conflict with the proposed action.

There are no relevant Federal rules that may duplicate, overlap, or conflict with this action.

A description of any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and that minimize any significant economic impact of the proposed rule on small entities.

There are no significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and that minimize any of the significant economic impact of the proposed rule on small entities.

RIR-Determination of Significant Impact

As mentioned above, the RIR is designed to determine whether the proposed action could be considered a significant regulatory action according to EO 12866. These regulations will not

trigger any of the EO 12866 test requirements for significant regulatory actions. In other words, it will not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; 2) create a serious inconsistency or otherwise interfere with action taken or planned by another agency; 3) materially alter the budgetary impact of entitlement, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or 4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the EO.

RFA-Determination of a Significant Impact.

The Regulatory Flexibility Act requires Federal agencies to conduct a full RFAA unless the agency can certify that the proposed and/or final rule would not have a significant economic impact on a substantial number of small entities. This determination can be made at either the proposed or final rule stage. If the agency can certify, it need not prepare an IRFA, a FRFA, or a Small Entity Compliance Guide or undertake a subsequent periodic review of such rules. The NMFS Guidelines for Economic Analysis of Fishery Management Actions suggest two criteria to consider in determining the significance of regulatory impacts, namely, disproportionality and profitability. These criteria relate to the basic purpose of the RFA, i.e., to consider the effect of regulations on small businesses and other small entities, recognizing that regulations are frequently unable to provide short-term cash reserves to finance operations through several months or years until their positive effects start paying off. If either criterion is met for a substantial number of small entities, then the rule should not be certified for not having an effect on small entities. . These criteria raise two questions: Do the regulations place a substantial number of small entities at a significant competitive disadvantage to large entities? Do the regulations significantly reduce profit for a substantial number of small entities?

This rule directly regulates what entities can harvest whiting. This rule allocates fish between tribal harvesters (harvest vessels are small entities, tribes are small jurisdictions) to non-tribal harvesters (a mixture of small and large businesses). Tribal fisheries are a mixture of activities that are similar to the activities that non-tribal fisheries undertake. Tribal harvests are delivered to both shoreside plants and motherships for processing. These processing facilities also process fish harvested by non-tribal fisheries.

NMFS believes this rule will not adversely affect small entities. Nonetheless, NMFS has prepared this IRFA and is requesting comments on this conclusion.

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